

MEMORANDUM

TO: Board of Environmental Protection

FROM: Beth Callahan, Project Manager, Bureau of Land & Water Quality, Augusta
Marybeth Richardson, Acting Licensing Coordinator, Bureau of Land & Water Quality, Augusta

RE: Dark Harbor Partners, Harry B. Hollins, Nicholas T. Love, James Houghton, and Laura Ault Appeal of Natural Resources Protection Act Approval #L-24406-4P-A-N, Arthur B. Choate, Islesboro

DATE: August 20, 2009

Statutory and Regulatory References: The applicable regulatory framework for this application is the Natural Resources Protection Act (NRPA), 38 M.R.S.A. §480-A to 480-FF and the Wetland and Waterbodies Protection Rules, Chapter 310. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2(24)(B).

Location: The project site is located off Wharf Landing Way East on Penobscot Bay in the Town of Islesboro.

Description: In Department Order #L-24406-4P-A-N, dated March 24, 2009, the Department approved the construction of a permanent granite crib supported pier that included a seasonal ramp and float. The foundation of the pier consisted of one crib composed of 10' by 10' granite blocks. To the extent practicable, granite blocks were to be obtained from a pre-existing structure in the coastal wetland. Additional granite blocks would be obtained from an off-site location, if necessary.

Dark Harbor Partners, Harry B. Hollins, Nicholas T. Love, James Houghton, and Laura Ault filed an appeal of the Department's decision in a letter dated April 20, 2009. The basis for the appeal is the appellants' assertion that the Department incorrectly erred in its findings as it applies to avoidance standards, scenic standards, and unreasonable impact standards. Further, the appellants argue that the Department did not consider Maine common law as it relates to the recovery of granite blocks for the pier foundation from the intertidal and subtidal area.

Coastal Wetland Considerations: The appellants assert that the Department failed to adequately apply Chapter 310 standards. The appellants contend that the Department did not consider an existing alternative to the proposed project and did not consider cumulative impacts of the storage of the seasonal ramp and float. The appellants assert that the Tarrantine Club, a private boat launching facility, is an alternative that is reasonable, practicable, and less damaging to the wetland.

The applicant considered usage of the Tarrantine Club as an alternative to the project site. The applicant stated that the Tarrantine Club is a private club on the west side of the island that allows its members to use its docking facilities. The applicant determined that members of this club are not allowed to have their boats docked at the facility's floats.

The Department considered the applicant's analysis of alternatives. Given the other existing docks in the surrounding area, the alternative's location on the other side of the island and lack of amenities, and the

existing vegetative screening at the project site, the Department determined that the applicant avoided and minimized wetland impacts to the greatest extent practicable, and that the proposed project represented the least environmentally damaging alternative that met the overall purpose of the project.

Existing Scenic, Aesthetic, Recreational, and Navigational Uses: The appellants assert that the Department incorrectly evaluated the impact of the project on the landscape. The appellants contend that the east side of Islesboro, in which the project is proposed, maintains a more pristine character than the west side of the island. Further, the appellants state that storage of the float and ramp above the highest annual tide line or on the permanent pier will have direct and cumulative impacts on the scenic and aesthetic uses of the wetland for the public and the appellants.

The applicant stated that the ramp and float will be seasonally affixed to the pier. In the winter months, the ramp will be stored on the permanent pier and the float will be stored in an upland location above the highest annual tide line. Further, the applicant stated that there are seventeen residential piers within a one mile radius of the project site.

As a condition of approval, the Department required the applicant take appropriate measures to store the seasonal ramp and float on the permanent pier or outside of the coastal wetland. This condition of approval was placed on the permit as a means of preventing further disturbance to the coastal wetland.

The Department conducted a site visit and evaluated the site using the Department's Visual Impact Assessment Matrix. Although the project is visible from vantage points on the water, the project is not visible from nearby scenic resources of statewide significance. Further, the Department observed that the immediate surrounding area is well screened from directly adjacent view by vegetation. The Department determined from the site visit and results of the matrix that the project would not unreasonably interfere with existing scenic, aesthetic, recreational, and navigational uses.

Property Law: The appellants assert that the Department did not consider Maine common law as it relates to the salvaging of granite blocks for use by the applicant to construct the foundation of the pier. Appellants state that Maine common law extends private property rights to mean low water subject to a public easement for fishing, navigation, and other activities. The property line between Dark Harbor Partners and the licensee's property extends through the area of granite blocks; thus, the appellants contend that the licensee is not entitled to all of the granite blocks.

The applicant has stated that he intends to use granite blocks in the intertidal and subtidal area to the extent feasible. The Department did not, in its approval of an NRPA permit for the proposed project, grant the applicant any rights or permission to use property to which he is not entitled.

Department Recommendation: After reviewing the appellants' arguments, the Department concludes that the applicant has met the requirements for an NRPA permit as described above. The Department recommends that the Board affirm the Department's decision to approve the proposed granite crib supported pier construction project in Department Order # L-24406-4P-A-N.

Estimated Time of Presentation: 1.0 hour